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No. 851

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

E. M. PIPER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

In The

Supreme Court of the United States

October Term, 1964

E. M. Piper,

Petitioner,

v.

The United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, E. M. Piper, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case (No. 21,466 below).

CITATION TO OPINION BELOW

The opinion of the Court of Appeals (R. 246, 247), printed in Appendix B hereto, *infra*, p. 7a, is reported at ..... F. 2d ..... The District Court did not render an opinion.

JURISDICTION

The judgment of the court below affirming Petitioner's conviction, printed in Appendix B hereto, *infra*, p. 9a, was dated and entered on December 1, 1964 (R. 248). A Petition

for Rehearing En Banc was filed with the Court of Appeals on December 16, 1964 (R. 250). An order denying the Petition for Rehearing, printed in Appendix B hereto, *infra*, p. 10a, was entered on December 29, 1964 (R. 255). Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. 1254(1), and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

The two questions presented by this Petition for Certiorari are:

(1) Whether there can be a *willful* failure to file a manufacturer's quarterly federal excise tax return where:

(a) A full, correct, honest and timely disclosure of the activities giving rise to a duty to file a manufacturer's quarterly tax return was made to the Internal Revenue Service by the taxpayer fourteen (14) days before the end of the taxable period involved; and

(b) A revenue agent, with the consent and knowledge of the taxpayer, examined the taxpayer's books and records and prepared a proper and correct return thirteen (13) days before the due date of the quarterly excise tax return for the period involved; and

(c) The required manufacturer's quarterly federal excise tax return prepared by the revenue agent from the taxpayer's books and records prior to the due date of the return was thereafter actually filed by an authorized Internal Revenue officer in accordance with statutory authority.

(2) Whether there can be a *willful* failure to pay manufacturer's excise taxes where:

(a) A full, honest and timely disclosure of the manufacturer's excise tax liability for the period involved was made to the Internal Revenue Service from taxpayer's books and records thirteen (13) days before the quarterly excise tax return was required by law to be filed.

(b) There was no willful failure to timely disclose the liability for manufacturer's excise taxes for the period involved.

STATUTES AND REGULATIONS INVOLVED

This case involves the Internal Revenue Code of 1954, Section 6020, 68A Stat. 740; Section 6501(b)(3), 68A Stat. 803; Section 7203, 68A Stat. 851; 26 Code of Federal Regulations 601.105(c). The foregoing statutes and regulations are printed in Appendix A, *infra,* p. 1a.

STATEMENT

Petitioner's judgment of conviction by the United States District Court for the Northern District of Texas, Dallas Division, on two misdemeanor counts was based upon a jury verdict finding him guilty of willful failure to file a manufacturer's quarterly federal excise tax return for the fourth quarter of 1959, and willful failure to pay manufacturer's excise taxes for the fourth quarter of 1959. There are two counts in the Federal Grand Jury Indictment, each involved the fourth quarter of 1959, i. e., the period from October 1, 1959 to December 31, 1959. (R. 236, 237).

Petitioner was engaged in the used car business in Dallas, Texas, for approximately forty-five years. (R. 132, 133). During 1958 Petitioner began importing Volkswagen auto-

mobiles from Germany for sale in the United States. (R. 133, 134, 141). While in Houston, Texas, on December 17, 1959, Petitioner first learned from another importer that, in addition to an import tax, there was an excise tax on the sale of imported cars. (R. 135, 136). On the same date, December 17, 1959, immediately after receiving this information, Petitioner went to see Mr. I. V. Davis, an excise tax agent of the Internal Revenue Service in Houston, Texas, to inquire about the federal excise tax on sales of imported automobiles. (R. 10, 12, 13).

Petitioner was advised on December 17, 1959, of a tax of 10% on an importer's selling price of an imported automobile (R. 12) and told that he should handle his excise tax business in Dallas. (R. 136, 142). Prior to December 17, 1959, Petitioner did not know that there was any federal excise tax due on sales of imported automobiles. (R. 13, 135).

On the following day, December 18, 1959, an excise tax agent of the Internal Revenue Service first visited Petitioner's place of business. A subsequent visit was made on January 18, 1960. (R. 19, 20). After properly identifying himself, the excise tax agent requested and was given all of Petitioner's car sales records for audit. (R. 20, 21, 22). The excise tax agent testified at the trial that he audited taxpayer's books and records on January 18, 1960, and that he prepared a quarterly excise tax return reflecting the results of this audit (R. 19, 20, 21, 22).

The results of this audit were discussed with Petitioner who disagreed with the examining agent and refused to sign the quarterly excise tax return which had been prepared. (R. 23, 24, 25).

When Petitioner did not agree to the tax proposed, a 10-day letter was issued setting up an informal conference

with the excise tax agent's supervisor. (R. 26, 27). This informal conference was held February 29, 1960. (R. 36). At this conference, Petitioner still did not agree with the audit results and again refused to sign a return. (R. 27).

Thereafter, on or about March 8, 1960, the excise tax agent signed and filed the return prepared by him from his audit of Petitioner's books and records. (R. 27, 28).

Petitioner's case was assigned to a Dallas revenue officer for collection on May 25, 1960. (R. 43, 44). First notice and demand for payment was left in an envelope with Petitioner's son on May 26, 1960, by the revenue officer. (R. 44). The period of time covered by the assessment which was assigned to the revenue officer for collection was the last quarter of 1958 through the fourth quarter of 1959. (R. 56, 57).

On May 27, the revenue officer checked the county records and found no property in Petitioner's name. (R. 44). On the same date the agent's levy against a bank account in Petitioner's name netted $2,147.00 (R. 45). The revenue officer first met Petitioner on June 7, 1960 (R. 45), and thereafter had talks with him about the tax assessment on July 6, 1960 (R. 47), October 13, 1960 (R. 48), October 28, 1960 (R. 49), and December 20, 1960 (R. 50). Petitioner had further discussions with respect to this excise tax problem with Internal Revenue Service personnel on December 13, 1961 (R. 59) and May 28, 1962 (R. 78). The revenue officer has been unable to find that Petitioner has assets with which to pay the tax subject to his levy. (R. 50).

Petitioner was indicted on May 13, 1963, for willful failure to file a quarterly excise tax return for the fourth quarter of 1959 and for willful failure to pay manufacturer's excise taxes for the fourth quarter of 1959.

The Court of Appeals below affirmed Petitioner's conviction in a brief, per curiam opinion which held that there was ample evidence to support the jury verdict and that Petitioner had received a fair and impartial trial. (R. 246; *infra,* p. 7a).

REASONS FOR GRANTING THE WRIT

There are two reasons why a review on a Writ of Certiorari should be granted in this case:

(1) The decision of the Court of Appeals in this case is in direct and irreconcilable conflict with the decision of this Court in *Spies* v. *United States* (1943), 317 U.S. 492; and

(2) The affirmance of the verdict in the lower court by the Court of Appeals in this case sanctions such a radical departure from the accepted definition of what constitutes "willfulness" for purposes of criminal intent so as to require the review of this Court.

CONFLICT

This Court, in *Spies* v. *United States,* (1943) 317 U.S. 492, exhaustively reviewed the system of civil and criminal penalties imposed by Congress for the protection of the federal revenues. The decision of the Court of Appeals in this case affirming the petitioner's convictions for willful failure to file an excise tax return for the fourth quarter of 1959 and for willful failure to pay manufacturer's excise taxes for the fourth quarter of 1959 is in direct and irreconcilable conflict with that decision of this Court.

WILLFUL FAILURE TO FILE

There is a ten percent excise tax imposed upon the first sale of a new or used automobile imported into the United States. *Smith* v. *United States,* 319 F. 2d 776 (C.A. 5 1963).

Each person required to pay the ten percent manufacturer's excise tax on the first sale of imported automobiles is required to make a quarterly return on Treasury Form 720 on or before the last day of the first calendar month following the period for which it is to be made. In this case the fourth quarter of 1959 ended December 31, 1959.

The quarterly excise tax return for the fourth quarter of 1959 was due to be filed by Petitioner on January 31, 1960. The testimony establishes that Petitioner first learned of the excise tax on December 17, 1959 (R. 12, 13, 135, 136); that Petitioner immediately contacted the Internal Revenue Service (R. 12, 13), and was advised to handle his business in Dallas (R. 136, 142); that on January 18, 1960 the taxpayer's books and records for the fourth quarter of 1959, were audited by the Internal Revenue Service and an excise tax return prepared for his signature (R. 19, 20, 21, 22, 23, 24, 25).

The examining revenue agent testified at the trial that he audited taxpayer's books and records on January 18, 1960, and prepared a return reflecting the results of this audit. (R. 19, 20, 21, 22). This was thirteen days before the due date of the return for the fourth quarter of 1959. Petitioner disagreed with the audit results and refused to sign the return prepared (R. 23, 24, 25).

Thus, it is uncontradicted that Petitioner contacted the proper officials of the Internal Revenue Service about his manufacturer's excise tax liability on December 17, 1959, fourteen days before the end of the fourth quarter of 1959. As a result of this contact, Petitioner's books and records were audited and a return prepared by the Examining Agent thirteen days before the due date, January 31, 1960.

In *Spies* v. *United States, supra,* the Court's discussion of the enforcement penalties with respect to the duty to file

returns concluded that the purpose of both the civil and criminal sanctions was to insure punctuality, i.e., the filing of timely returns. The Court said (317 U.S. 492, 495, 496):

> "The failure in a duty to make a *timely return*, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, is punishable by an addition to the tax of 5 to 25 per cent thereof, depending on the duration of the default. § 291 of the Revenue Act of 1936 and of the Internal Revenue Code. But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civic penalty. Hence *the willful failure to make a return*, keep records, or supply information when required is made a misdemeanor, without regard to existence of a tax liability. § 145(a). *Punctuality* is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties." (Emphasis supplied).

Petitioner's timely disclosure of his obligations to file a quarterly excise tax return to the Internal Revenue Service *fourteen days* before the end of the fourth quarter of 1959 and his assistance to the revenue agent in the preparation of a return from his books and records *thirteen days* before the due date of the quarterly excise tax return can hardly be said not to be timely or to lack the requisite of punctuality.

While it is true that Petitioner disagreed with the return prepared by the examining agent and refused to sign the return (R. 23, 24, 25), the agent testified that under existing Internal Revenue practice Petitioner had *a right* to appeal to his supervisor (R. 26, 27). Petitioner was granted an informal conference with the agent's supervisor (R. 27) which was held on February 29, 1960 (R. 36).

When Petitioner still disagreed at the informal conference with the results of the audit, the excise tax agent, on or about March 8, 1960, signed and filed the return prepared by him from the Petitioner's books and records under the authority of Section 6020 of the Internal Revenue Code of 1954 (R. 27, 28)

The filing by the agent under statutory authority was accomplished with the Petitioner's knowledge, and the Petitioner's uncontradicted and unimpeached testimony at the trial was that the reason he did not file the return was because it had been filed by the examining agent. (R. 144, 145).

It is inconceivable that Petitioner's conviction for willful failure to file an excise tax return can be sustained when (as here) the evidence establishes the *timely* preparation of the return due and the actual filing of that return after Petitioner enjoyed the exercise of his right to a customary administrative appeal. A return executed by an authorized Internal Revenue Officer is good and sufficient for all legal purposes, Section 6020(b), except starting the period of limitations, Section 6501(b)(3).

We submit that these facts conclusively establish a legally adequate filing, and preclude a valid conviction for willful failure to file under the definition of that term as pronounced by this Court.

The manifest error in the Conviction on Count One is clearly demonstrated when you assume one fact, hypothetically, in addition to the undisputed facts outlined above. Assume that petitioner had paid the taxes shown due on the return when it was filed by the agent.

In the context of the unique facts of this case, the one additional fact of payment would make it clear beyond

doubt that there was no willful failure to file a return. Yet, the validity of the conviction under Count One is not affected, legally, by payment. The Court in the *Spies* case held there could be a willful failure to file a return without regard to the existence of a tax liability.

It is submitted that the facts of this case clearly fail to establish a willful failure to file as that offense has been previously defined by this Court in the *Spies* case. The action of the Court of Appeals in affirming the lower court conviction therefore departed from accepted and established legal principles and should be reviewed by this Court.

WILLFUL FAILURE TO PAY

Petitioner made a timely and full disclosure of the liability for manufacturer's excise taxes for the fourth quarter of 1959 on January 18, 1960, thirteen days before the return was due to be filed and the tax paid.

In the *Spies* case the Court, in discussing what constitutes a misdemeanor, willful failure to pay a tax, said (317 U.S. 492, 497, 498):

> "* * * in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree."

This "willful failure to disclose" test has neither been amended by Congress nor overruled by the Court.

Thus, Petitioner's conviction on Count Two is repugnant to and in direct and irreconcilable conflict with the holding of the *Spies* case and should be reviewed by the Court.

WILLFULNESS

This Court, in *Spies* v. *United States, supra,* in discussing the problems of great complexity raised by the Internal Revenue laws said (p. 496): "* * * It is not the purpose of the law to penalize frank difference of opinion * * *."

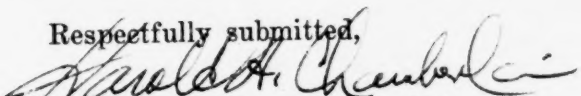
Petitioner may have displayed a lack of finesse in the handling of his excise tax problems but he made a full, correct, honest and timely disclosure of both his duty to file a quarterly excise tax return and the amount of his manufacturer's excise tax liability for the fourth quarter of 1959 prior to the date on which the return was required to be filed and the tax required to be paid.

The Court of Appeals decision in affirmance of the verdict of the lower court sanctions a radical departure from the accepted concept of "willfulness" set forth in the *Spies* case and should be reviewed by the Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



(Signed) Harold A. Chamberlain

HAROLD A. CHAMBERLAIN
Counsel for Petitioner

Dated January 21, 1965

APPENDICES

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954

Sec. 6020. Returns Prepared for or Executed by Secretary.

(a) Preparation of Return by Secretary. — If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary or his delegate may prepare such return, which, being signed by such person, may be received by the Secretary or his delegate as the return of such person.

(b) Execution of Return by Secretary.

(1) Authority of Secretary to Execute Return. — If any person fails to make any return (other than a declaration of estimated tax required under Section 6015 or 6016) required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of Returns. — Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes. (68A Stat. 740.)

Sec. 6501. Limitations on Assessment and Collection.

(a) * * *

(b) Time return deemed filed.

(1) * * *

(2) * * *

(3) Return executed by secretary—Notwithstanding the provisions of paragraph (2) of Section 6020(b), the execution of a return by the Secretary or his delegate pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection. (68A Stat. 803.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than one year, or both, together with the costs of prosecution. (68A Stat. 851.)

TREASURY REGULATIONS

Sec. 601.105(c). Informal Conference Procedure.

(c) *Informal conference procedure*—(1) *General.* If the taxpayer does not agree with the findings of the examining agent, the taxpayer is advised in writing that he may present his objections to such findings at an informal conference in the Audit Division of the district director's office.

The taxpayer is usually granted 10 days from the date of the written notice in which to request an informal conference on the proposed changes. Such request may be made by telephoning or writing to the number or address set forth in such written notice. If the taxpayer fails to request an informal conference within such time or to obtain an extension of time for requesting a conference, the examining agent will proceed with the completion of his report, a copy of which will be mailed to the taxpayer by the district director under cover of a "30-day letter" stating the action proposed to be taken. For further procedure in such a case, see paragraph (d) of this section.

(2) *Scope of informal conference procedure.* The informal conference procedure described in this paragraph is applicable in the determination of any liability in respect of income, profits, estate, gift, excise, or employment taxes. This procedure, however, is not applicable in the determination of liability for any excise tax imposed by subtitle E of the Internal Revenue Code (relating to alcohol, tobacco, machine guns and certain other firearms), or by subchapter D of chapter 78 (relating to certain import taxes) insofar as it relates to alcohol and tobacco. The procedure described in this paragraph does not apply in any case where criminal prosecution is under consideration, or in any case in which, in the discretion of the district director of internal revenue, the Government's interest would be prejudiced thereby. Nor does this procedure preclude the taking of appropriate action where the assessment or collection of the tax is in jeopardy. See paragraph (h) of this section.

(3) *Rules governing informal conferences.* The objective of the informal conference procedure is to give taxpayers greater opportunity to reach an early agreement with respect to disputed items arising from examinations

made by internal revenue agents. This procedure affords a means by which such issues may be resolved prior to the preparation of the agent's final report and without the necessity of the taxpayer filing a formal protest. The examining agent will be present at the conference. If the taxpayer is represented by an attorney or agent, the rules with respect to their recognition and the filing of powers of attorney are applicable. For conference and practice requirements, see Subpart E In the conduct of informal conferences, it is the duty of the group supervisor or other officer who may be acting as conferee to conduct the conference in accordance with the objectives of the informal conference procedure and to provide the taxpayer a fair and courteous hearing at which the taxpayer may present his statement of facts and his view of the issues; to make certain that all pertinent facts are included in the record and are considered in arriving at the proposed recommendation; to make certain that the pertinent provisions of the Internal Revenue Code are applied in arriving at the proposed recommendation and that the proposed recommendation is in accord with the interpretations of the Internal Revenue Service as expressed in regulations and rulings; and to explain fully to the taxpayer the conclusions reached and the reasons therefor. It is the responsibility of the group supervisor or other designated officer to prepare a conference report with respect to each case on which an informal conference is held. This report, which will set forth briefly and concisely the facts and conclusions reached with respect to each issue, will be made available to the examining officer. In preparing his report the examining officer will give effect to the conference decisions. The examination report and the conference report are subject to review in the Audit Division of the district director's office. The purpose of this review is to insure uniformity in the application of the provisions

of the Code, the regulations and rulings, as well as the general policy of the Service. In the event that an agreement with the taxpayer is reached at the informal conference, the taxpayer will be requested to execute Form 870 or other appropriate agreement form. Any deficiency in tax or additional tax proposed will then be assessed, or any overpayment will be credited or refunded.

(26 Code of Federal Regulations § 601.105(c).)

APPENDIX B

OPINIONS, JUDGMENTS AND ORDERS BELOW

Court of Appeals Opinion

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21466

E. M. PIPER,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS.

(December 1, 1964)

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

PER CURIAM: The appellant complains of a judgment of conviction on a two count misdemeanor indictment entered upon a jury verdict finding him guilty of wilfully and knowingly failing to file a manufacturer's quarterly excise tax return on imported automobiles, and wilfully and unlawfully failing to pay such excise tax in violation of Title 26 U.S.C.A., section 7203. The chief contention of the defendant is that the evidence presented against him is not legally sufficient to sustain the convictions because, (a) the evidence shows that a quarterly excise

tax return was filed for the period involved; (b) a failure of the evidence to show that such taxes were due and payable; and (c) there was not sufficient evidence to establish wilfulness.

Our review convinces us that there is no merit in the contentions of the defendant; the evidence amply supports the jury verdict of guilt; and the defendant received a fair and impartial trial. The judgment is AFFIRMED.

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1964

No. 21466

D. C. DOCKET NO. 3-63-113-Cr.

E. M. PIPER,
Appellant,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS.

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 1, 1964

Issued as Mandate:

COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

[233] — Gewin

U. S. Court of Appeals
FILED
DEC 29 1964
Edward W. Wadsworth
Clerk

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 21,466

E. M. Piper,
Appellant,

vs.

United States of America,
Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(December 29, 1964)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

DISTRICT COURT JUDGMENT AND COMMITMENT

FILED MARCH 5, 1964

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA,

VS. No. CR 3-63-113

E. M. PIPER

JUDGMENT AND COMMITMENT

On the 26th day of February, 1964, came the attorney for the government and the defendant appeared in person and with counsel,

IT IS ADJUDGED that the defendant has been convicted on his plea of not guilty and verdict of guilty of the offenses of wilfully and knowingly failing to make a manufacturer's quarterly excise tax return on imported automobiles, in violation of Section 7203 of the Internal Revenue Code 1954, Title 26, U.S. Code, Section 7203 as charged in Count I of a two-count indictment; and wilfully and unlawfully failing to pay the manufacturer's excise tax on imported automobiles in the amount of $89,672.59 in violation of Section 7203 of the Internal Revenue Code 1954, Title 26, U.S. Code, Section 7203, as charged in Count II of the two-count indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted on both counts.

Thereafter, on March 5, 1964,

On Count One, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of 90 days, and fined the sum of $5,000.00.

On Count Two, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of ONE YEAR. This sentence to run consecutively to the sentence imposed on Count One. The execution of the sentence imposed on this Count Two only is suspended and the defendant placed on probation for the period of 15 months on the following terms and conditions:

1. That the defendant pay the $5,000.00 fine provided for in this judgment within 90 days from the date of this judgment.

2. That the defendant pay to the District Director of Internal Revenue at Dallas, Texas, within 90 days from this date, the manufacturer's excise tax in the amount of $89,672.59 which defendant owes to the United States for the period from October 1, 1959 through December 31, 1959, as specified in the indictment, and the penalty thereon, as heretofore determined and assessed; by the Commissioner of Internal Revenue, together with all accrued interest thereon to the date paid.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe, including those contained in Probation Form 7. Otherwise the defendant may

be brought before the Court for a violation of the Court's orders.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to the Federal Correctional Institution, Seagoville, Texas.

Dated the 5th., day of March, 1964.

s/ JOE E. ESTES
United States District Judge

JOHN A. LOWTHER, Clerk

By .....
Deputy

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 851

E. M. PIPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 7203 of the Internal Revenue Code of 1954, which is set out at page 2a of the Appendix to the Petition, makes it a misdemeanor for any person willfully to fail to pay a tax or to make a return. After a jury trial, petitioner was convicted on a two-count indictment (R. 236–238)[1] of willful failure to file a federal excise tax return for the fourth quarter of 1959 (Count 1) and to pay the excise tax owed for that period (Count 2). He was sentenced to ninety days' imprisonment and fined $5,000 on Count 1, to be followed by a consecutive sentence of one year on Count 2. The latter sentence was suspended

[1] "R." references are to the mimeographed record filed in the court of appeals.

764-442—65

and petitioner was placed on probation for a period of fifteen months (R. 240–242). The sole question raised on appeal and in this Court concerns the sufficiency of the evidence to support the jury verdict, a question that petitioner did not preserve by renewing his motion for acquittal at the close of all the evidence (see *Costner* v. *United States,* 271 F. 2d 261, 262 (C.A. 6), certiorari denied, 362 U.S. 952) and that does not warrant further review. In addition, the evidence was plainly adequate to sustain the conviction.

Petitioner imported and sold Volkswagen automobiles during the last quarter of 1959 (R. 134–135). These sales made him liable for the manufacturer's excise tax imposed by Section 4061(a)(2) of the 1954 Code. The return for the last quarter of 1959 should have been filed on or before January 31, 1960. It is not disputed that on December 17, 1959, an excise-tax agent told petitioner of his obligation to pay the tax, and that on January 18, 1960, another agent examined petitioner's records and determined that petitioner owed $89,672.59 on his sales of $1,103,871 for the fourth quarter of 1959 (R. 10–12, 20–22).

Petitioner agreed with the accuracy of the agent's computation but refused to file the return (R. 23–26). At a subsequent conference, petitioner explained that he would not sign a return because "he saw nothing to gain" by it and "he didn't want to agree to something that he couldn't pay and still stay in business" (R. 27, 37). An agent subsequently signed the return in petitioner's name pursuant to Section 6020(b)(1) of the 1954 Code (Pet. 1a), but petitioner

continued to refuse to pay the tax. He explained on a number of occasions that he had the money to pay it but that he would not, because it would leave him "broke" (R. 38, 46, 51). He freely admitted that he had sold his properties and had taken over $200,000 in cash to Canada to be placed in a lock box where it could not be reached by the government (R. 48–49, 60, 61). But, without disputing the correctness of the tax, he stated that he would rather go to jail than pay it (R. 79, 84).

In light of these facts, the present case involves the clearest possible example of a taxpayer's willful refusal to file a return or pay a tax. The jury was properly instructed that "an act is done 'willfully' if done voluntarily and purposely and with specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose either to disobey or disregard the law" (R. 185). The instruction fully complied with this Court's decision in *Spies* v. *United States,* 317 U.S. 492, 497–498, and the facts indisputably sustain the jury's finding that petitioner had willfully and with evil motive disobeyed the law. It is hardly necessary to add that petitioner's willful disregard of the statute was not remedied by the Commissioner's filing of a return on petitioner's behalf under Section 6020(b)(1), an action taken months after petitioner's return was due and taken solely to form the predicate for attempts to collect the tax owing.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965